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Nos. 81-2245, 81-2276 and 82-38

In The

Supreme Court of the United States

October Term, 1982

STATE OF NEVADA,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PYRAMID LAKE PAIUTE TRIBE OF INDIANS AS RESPONDENT IN NOS. 81-2245 and 81-2276

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SUMMARY OF ARGUMENT

The petitioners' efforts to reargue the facts and to resurrect the collateral estoppel defense should be rejected summarily. The lower courts' findings have not been challenged and it is not the province of this Court to make an original appraisal of the facts. The District Court's determination that collateral estoppel could not be applied to defeat the Tribe's claimed fishery water right was based on its factual finding that the issue was not actually litigated and determined in *Orr Ditch*, is

clearly correct, and was not, in any event, briefed or argued to the Court of Appeals.

There was no adversity between the Tribe and TCID in the *Orr Ditch* litigation. They were nonparties who were represented simultaneously by the same government attorneys. Claims cannot be precluded where parties are not aligned on opposite sides of litigation and there is no adversary relationship between them. The application of this rule to this case precisely fits the practical, physical, legal and historic realities of this controversy and of the *Orr Ditch* litigation. No case or other authority upholds the res judicata defense of one nonparty against another nonparty when both nonparties were "represented" by the same party and the issue was not actually litigated and determined.

The Tribe's fishery water right has not been extinguished by the Truckee River Agreement considered solely as a contract rather than as part of the *Orr Ditch* decree. This issue was not included in the District Court's bifurcation order and was not argued to the Court of Appeals. The abstract legal issue of whether the Secretary was empowered to extinguish the Tribe's property right by contract is not ripe for determination because the lower courts had no occasion to construe the Agreement. Since the Truckee River Agreement does not even allude to the fishery water right and there is no evidence that the right was mentioned in any of the negotiations that led to the Agreement, it cannot possibly satisfy the strict requirements for finding a clear and plain intent to extinguish Indian property rights. Moreover, it is well established that the Secretary of the Interior lacks authority to take Indian water rights for the benefit of federal reclamation projects or to make gifts or donations of Indian trust property.

The Pyramid Lake Indian Reservation and all of the appurtenant property rights are held by the United States in trust for the Tribe. Federal officials are required to carry out the government's trust responsibility and have no authority to deal with the Tribe's property upon any other theory. Since the government officials responsible for the *Orr Ditch* litigation totally failed to assume or to implement their obligation to defend, preserve and protect the Tribe's right, its extinguishment cannot be predicated on their unauthorized acts and omissions.

Given the interlocutory posture of this case, the pendency of several other related cases, and other unresolved contingencies, it is impossible to assess the ultimate impact of the Tribe's fishery water right on TCID and other Truckee River water users. It is likely that substantial amounts of water can be conserved on the Newlands Project by increasing efficiency and reducing waste. Depriving the Tribe and the United States of the opportunity of proving that the Pyramid Lake fishery needs more water than it is currently receiving could result in the "incalculable" loss of an endangered species and an endangered genus.

ARGUMENT

I.

Petitioners Cannot Reargue the Facts or Resurrect the Collateral Estoppel Defense.[1]

[1]Pursuant to Sup. Ct. Rule 34.5, all of the exhibits to which reference is made in this Brief are listed on a table in the Appendix (App. 1) along with the page numbers of the transcript at which they were offered into evidence and ruled on by the trial judge.

A. The Facts.

The posture of this case has changed significantly over its course. Although the defendants prevailed in the District Court, two of them, Nevada and TCID, petitioners in Nos. 81-2245 and 81-2276, have formulated new positions before this Court to take account of intervening events. But those new positions cannot be reconciled with the lower courts' factual findings.

In the trial of this case, Nevada alleged and proved to the District Court's satisfaction that representatives of the United States made a conscious, deliberate decision not to assert a reserved water right for fishery purposes for the Pyramid Lake Reservation in the *Orr Ditch* litigation owing to the conflict between that potential claim and the right being pressed by the United States for the Newlands Reclamation Project. PA 165a, 189a-190a. This argument was predicated on the legal theory that the Secretary of the Interior was delegated authority under the 1902 Reclamation Act, 32 Stat. 388, as amended by Section 26 of the 1904 Interior Department Appropriations Act, 33 Stat. 189, 225 (PA 219a-20a), to take the Tribe's water rights for the benefit of the Newlands Project. Nevada contended, and the District Court held, that the Secretary's deliberate failure to assert the Tribe's claimed right in *Orr Ditch* resulted in its extinguishment under authority of these statutes. PA 161a-167a, 215a-216a. Although the District Court made other determinations, it readily acknowledged that "primary reliance" was placed on this theory. PA 161a.

Specifically, the lower courts entered the following findings: (i) that the government's intention in the *Orr Ditch* litigation was "to do everything possible to protect

the fish for the benefit of the Indians and the white population insofar as it was 'consistent with the larger interests involved in the proposition having to do with the reclamation of thousands of acres of now useless land for the benefit of the country as a whole,'" PA 185a, quoting Ex. U-113, JA 341; (ii) that "[the government] never relinquished or limited its representation of the [Newlands] Project's interests," PA 245a; *see also*, PA 179a; and (iii) that "a *Winters* implied and reserved water right for fishery purposes was [not] actually ever litigated in the course of the *Orr Ditch* proceedings," PA 189a, 245a.[2]

Six months after the District Court's decision, this Court issued its opinion in *California v. United States*, 438 U. S. 645 (1978). *California* held that under the 1902

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[2]There is no evidence in the entire record in this case, which includes all of the known, relevant historic documents concerning the *Orr Ditch* litigation and the Pyramid Lake fishery, that any government official or attorney ever considered the legality of subordinating the Tribe's water rights to those of the Reclamation Project. *Compare*, e. g., Bryant v. Yellen, 447 U. S. 352, 361-64, 377-78 (1980); Andrus v. Shell Oil Co., 446 U. S. 657, 666-68 (1980); United States v. Ahtanum Irrig. Dist., 236 F. 2d 321, 329 n. 11a, 330-31 n. 12, 333-34, 337 (9th Cir. 1956), *cert. denied*, 352 U. S. 988, *opinions on remand*, 330 F. 2d 897 (9th Cir. 1964), 338 F. 2d 307 (9th Cir. 1964), *cert. denied*, 381 U. S. 924. Nor is there any evidence suggesting any reason for not asserting the fishery right on the Tribe's behalf other than: (i) that it conflicted with the claims asserted on behalf of the Newlands Project; (ii) that it was not encompassed in the *Orr Ditch* litigation; and (iii) that it was considered too late to introduce the evidence needed to support the fishery claim once the trial had been completed. *See* PA 204a-208a. None of these reasons lend any weight to the theories now advanced by Nevada and TCID. There is no indication that anyone in the government believed that the claim was not meritorious, that it should not be asserted for strategic reasons, or that its assertion would be contrary to the Indians' best interests.

Reclamation Act water rights for reclamation projects must be acquired pursuant to state law. 438 U. S. at 665, 668 n. 21. The necessary consequence of this holding was that the Reclamation Act could not authorize the extinguishment or forced acquisition of the Tribe's fishery water right which is predicated on federal law. The Court of Appeals so ruled, PA 216a-217a, and that determination has not been challenged by the petitioners in this Court.

As a result, the petitioners now find themselves in the awkward position of having to abandon the lower courts' findings in order to fit within other theories that are not foreclosed by *California*. Thus, they claim: (i) that the Secretary acted in a manner that was fully consistent with his fiduciary responsibilities, Nev. Br. at 44; TCID Br. at 9-10, 19; (ii) that the conflict between the water needs of the fishery and the Newlands Project had nothing to do with the government's conduct of the litigation, Nev. Br. at 16, 35-36 n. 43; TCID Br. at 18-19, 30; (iii) that the United States ceased representing the interests of the Newlands Project after 1926, Nev. Br. at 35; TCID Br. at 18, 42; and (iv) that the fishery water right was actually litigated and determined in *Orr Ditch*, Nev. Br. at 40-43; TCID Br. at 34-35.

These contentions ignore and are inconsistent with the lower courts' findings recited above. Those findings have not been challenged as clearly erroneous or unsupported by the record. In the absence of any such claim and determination, this Court's review of the legal questions presented must be based on the facts found by the lower courts. "It is not for us to make an original appraisal of the facts." *Connecticut Light and Power Co.*

v. FPC, 324 U. S. 515, 534 (1945). *See also, Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S. Ct. 2182, 2188-90 (1982); *United States v. Sioux Nation of Indians*, 448 U. S. 371, 421 n. 32 (1980).

B. Collateral Estoppel.

As noted, the District Court found "no evidence" that the fishery water right was actually litigated in *Orr Ditch*. PA 189a. The Court of Appeals agreed. PA 245a. Based on this finding, the District Court ruled that "the principles and elements of the doctrine of collateral estoppel do not apply to bar the claims of the plaintiff and the Tribe and the defendants have failed to sustain their burden of proof on that defense." PA 192a. *See Parklane Hosiery Co. v. Shore*, 439 U. S. 322, 326 n. 5 (1979). No appeal or cross-appeal was taken from these factual and legal determinations. Nor did any of the defendants' appellate briefs raise any issues concerning the applicability of collateral estoppel or the scope of the issues that actually were litigated and decided in *Orr Ditch*.

Nevertheless, both Nevada (Br. at 23, 37) and TCID (Br. at 35-36) now seek to invoke collateral estoppel to overturn the Court of Appeals' holding that the Tribe is not barred from asserting its fishery water rights claim against TCID and the Newlands Project.[3] These efforts

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[3]The collaeral estoppel issue in this case is also directly related to the petitioners' challenges to the Court of Appeals' holding that the Tribe's claims against TCID are not barred owing to the lack of adversity in *Orr Ditch* between the two nonparties. *See* Part II, *infra*. Both questions turn on whether the fishery issue was actually litigated and determined in *Orr Ditch*. See PA 226a n. 11, 245a, *infra* at 9-11.

must be rejected for procedural as well as substantive reasons.

The Court will not consider issues that were not raised or argued to the Court of Appeals. *Delta Air Lines, Inc. v. August,* 450 U. S. 346, 362 (1981); *United States v. Ortiz,* 422 U. S. 891, 898 (1975). Nor will the Court undertake to review concurrent findings of fact by two lower courts in the absence of an obvious and exceptional showing of error. *Branti v. Finkel,* 445 U. S. 507, 512 n. 6 (1980); *Berenyi v. INS District Director,* 385 U. S. 630, 635-36 (1967). Nevada and TCID have not attempted to make such a showing.

Assuming *arguendo* that the matter is properly before the Court, the lower courts' findings and conclusions should not be disturbed. TCID and Nevada claim that the finding is "irrelevant" because the *Orr Ditch* case "subsumed" the issue of whether preserving access to the Pyramid Lake fishery was one of the Reservation's purposes. Nevada Br. at 40-43; TCID Br. at 34-42. This contention ignores the realities of the *Orr Ditch* litigation, is foreclosed by the controlling decisions of this Court, and confuses issue and claim preclusion.

The *Orr Ditch* case was concerned with the rights to the use of Truckee River water. The purposes of the Pyramid Lake Reservation were relevant only to the extent that Truckee River water was claimed to be necessary to fulfill those purposes. *See, e. g., Cappaert v. United States,* 426 U. S. 128, 139 (1976) (issue in a reserved water rights case is whether the government intended to reserve unappropriated water and that intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes of the reservation):

Nev. Br. at 3 (sufficient water reserved to satisfy purposes which require water). Since the United States never claimed or introduced any evidence to show that any Truckee River water was necessary for the Pyramid Lake fishery, the issue of whether the purposes of the reservation included the fishery never arose and was not "subsumed" under any other issue. *See Restatement (Second) of Judgments* § 27, comment f (1982). The *Orr Ditch* litigation no more determined the fishery purpose of the Reservation than it decided whether the purposes of the Reservation included the removal of tribal members from the emigrant trails in order to avoid conflict with white settlers and travelers. *See* PA 183a.[4]

The test for determining identity of issues for collateral estoppel purposes is whether "the 'question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged' "

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[4]Paragraph 16 of the Government's Amended Complaint in *Orr Ditch* stated that the United States established the Pyramid Lake Reservation in 1859 in order to protect the Indians and their descendents "in their homes, fields, pastures, fishing, and their use of said lands and waters, and [to] afford . . . them an opportunity to acquire the art of husbandry and other arts of civilization, and to become civilized. . . ." PA 6a. Neither the Amended Complaint nor any other *Orr Ditch* pleading or document alleged or stated that Truckee River water was necessary for fish purposes. *See* the Tribe's Brief as Cross-Petitioner at 22-23 & n. 12.

The District Court twice mistakenly paraphrased paragraph 16, stating that it related to the government's purpose in instituting the *Orr Ditch* action rather than in establishing the Pyramid Lake Reservation. PA 184a-185a, 188a. This error was brought to the attention of the Court of Appeals which correctly observed that "[t]he government did not assert a claim for water to sustain the Pyramid Lake fishery [in *Orr Ditch*] . . ." PA 198a. *See* Nev. Br. at 4-5, 49 n. 63; TCID Br. at 7, 15.

in the prior case. *Montana v. United States*, 440 U.S. 147, 157 (1979), *quoting United States v. Moser*, 266 U.S. 236, 242 (1924). *See also*, 440 U.S. at 152 ("a 'right, question or fact distinctly put at issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit . . .,'") *quoting Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897); *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 n. 5 (1979). Applying these decisions, there is no doubt that the Reservation's fishery purpose was not "distinctly put at issue," "directly determined" or "definitively and actually litigated and adjudged" in the *Orr Ditch* litigation. Both lower courts so held and the petitioners basically concede the point. *See, e.g.*, Nev. Br. at 10, 42; TCID Br. at 13.

Stripped to its essence, Nevada and TCID are really arguing no more than that the claimed fishery water right could and should have been presented and litigated in *Orr Ditch*. But this contention confuses the distinction between claim preclusion, res judicata, and issue preclusion, collateral estoppel. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955).[5] While questions concerning what could or should have been litigated are relevant in deciding identity of claims for res judicata purposes, they have no applicability in determining whether a party is precluded from litigating an issue by virtue of collateral estoppel. In this respect, this Court

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[5]The petitioners' confusion is illustrated by Nevada's untenable claim that the decisions below are inconsistent insofar as they hold that the fishery water right issue was not actually litigated in *Orr Ditch* but nevertheless is part of the *Orr Ditch* claim. Nev. Br. at 43. The decisions below are inconsistent in this respect only if the distinction between res judicata and collateral estoppel has ceased to exist. *See* the Tribe's Brief as Cross-Petitioner at 18-19.

has not departed from the holding in *Cromwell v. County of Sac*, 94 U. S. 351 (1877), that collateral estoppel does not bar the assertion of issues that were not "actually litigated and determined in the original action" 94 U. S. at 353, 356. *See, e. g., Larson v. Northland Transp. Co.*, 292 U. S. 20 (1934) (a judgment has no collateral estoppel effect as to matters which might have been, but were not in fact, litigated); *Mercoid Corp. v. Mid-Continent Invest. Co.*, 320 U. S. 661, 671 (1944); *Brown v. Felsen*, 442 U. S. 127, 139 n. 10 (1979); *Kremer v. Chemical Constr. Corp.*, 102 S. Ct. 1883, 1889-90 n. 6 (1982); 1B *Moore's Federal Practice* ¶ 0.441[1] (2d ed. 1982).[6]

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[6]Nevada and TCID rely on Section 27 of the *Restatement (Second) of Judgments* (1982) and recent lower court decisions in support of their argument that the claimed fishery water right should be foreclosed by operation of collateral estoppel. These authorities cannot, of course, displace or overcome the Court's precedents cited in the two preceding paragraphs. *See* Montana v. United States, 440 U. S. 147, 164 (1979) (Rehnquist, J. concurring).

Moreover, Nevada and TCID would not prevail in this case under any conceivable standard. There is no doubt that the fishery issue was not "actually litigated and determined" in *Orr Ditch* as expressly required by Section 27 of the *Restatement (Second) of Judgments, supra*. There was neither an incentive nor a full and fair opportunity for the United States to litigate any issue relating to the Tribe's fishery water right in litigation in which the same government attorneys were at the same time advancing the conflicting claims of the Newlands Reclamation Project. Indeed, it would have been improper, illegal, unethical and impossible for the government to have done so. *See* Tribe's Brief as Cross-Petitioner at 26-30.

Contrary to the petitioners' position, Section 27 of the *Restatement (Second) of Judgments, supra*, does not countenance the application of collateral estoppel to unlitigated issues. Comment e to that Section states that "[a] judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action." When that is difficult to determine, "policy considerations . . . weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly." *Ibid.*

In short, the lower courts' rulings that the fishery water right was not actually litigated and determined and that collateral estoppel does not preclude the assertion of that right are not subject to review by this Court and should not be overturned or set aside in any event.

II.

The Lack of Adversity Prevents TCID From Taking Advantage of Res Judicata.

Neither the Tribe nor TCID[7] were parties in *Orr Ditch*. The Tribe's interest in securing water for the Pyramid Lake Reservation and TCID's interest in obtaining water for the Newlands Project were represented by the same government attorneys throughout the entire litigation. PA 165a, 184a, 198a, 244a-45a. The United States faithfully represented TCID's interests by securing the largest possible water right for the Newlands Project. *See* PA 164a-67a, 201a, 204a.[8] Although the government was aware of the Tribe's claim for a fishery water right, no such claim was asserted in *Orr Ditch* owing to the conflict between that claim and the perceived water requirements of the Newlands Reclamation Project.

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[7]TCID is the organization that operates the Newland Project and represents its water users. As used in our Briefs, "TCID" refers not only to the entity itself, but to all farmers and water users represented by TCID in this litigation. *See* TCID Br. at 3 n. 2.

[8]TCID's claim (Br. at 9-10, 42) that the United States did not represent the Project's interests in the negotiations that led to the Truckee River Agreement is untrue. *See, e. g.*, Ex. B-364 (February 1936 letter from Justice Department attorney to the Attorney General recommending approval of Truckee River Agreement and *Orr Ditch* decree and stating that "there is nothing in [those documents] that would jeopardize the government's water rights for either the Pyramid Lake Indian Reservation or its Newlands Project, or the Government's security for the repayment of construction costs by the water users of the Project.")

PA 164a-67a, 179a, 185a-86a, 187a, 189a, 198a, 205a-08a.[9] Under these facts, the Tribe cannot be precluded from asserting its water rights claims against TCID that were not actually litigated and determined in *Orr Ditch*.

The rules regarding the application of res judicata and collateral estoppel between the Tribe and TCID are simple and straightforward.

> Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are bound by and entitled to the benefits of issue preclusion with respect to issues they actually

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[9]Nevada claims that it is not aware of any allegations by the Tribe of specific misconduct by the government or of any instances of inadequate representation by the government of the Tribe's interests. Br. at 44. It is hard to take this statement at face value at this advanced stage of the litigation. *See, e. g.*, PA 239a, 242a-43a (describing the government's representation of the Tribe's interest in *Orr Ditch* as "analogous to that of a faithless fiduciary," and stating that "[b]y representing the Tribe and the Project against the *Orr Ditch* defendants, the government compromised its duty of undivided loyalty to the Tribe.") Nevertheless, we do not want to leave any doubts on this critical score.

The Tribe has alleged and proved that the United States acted improperly: (i) in appearing in the *Orr Ditch* litigation on behalf of the conflicting interests of both the Pyramid Lake Indians and the water users on the Newlands Project without joining the Tribe, TCID or the project farmers; (ii) in subordinating the Tribe's claim to a fishery water right to the water right that was asserted for the Newlands Project; (iii) in allowing the Truckee River waters to which the Tribe has a claim of prior right to be diverted to the Newlands Project; (iv) in failing to notify the Tribe that its claimed fishery water right might be placed at jeopardy by the *Orr Ditch* litigation; (v) in not asserting the Tribe's claim to a fishery water right or taking any action to insure that it was asserted by representatives or attorneys unencumbered by a conflict of interest; and (vi) in allowing the Tribe's interests to be represented by an attorney who had previously represented TCID and to be finally adjudicated by a judge who had previously appeared as an attorney in the litigation and had argued against water rights for the Reservation. *See* the Tribe's Brief as Cross-Petitioner at 5-10, 38-41.

> litigate fully and fairly as adversaries to each other and which are essential to the judgment rendered.

Restatement (Second) of Judgments § 38 (1982).

For purposes of this case, there are no material differences between the rules stated in the first and second Restatements. *Compare Restatement of Judgments* § 82 (1942). Both limit the application of preclusion defensive between non-adversaries to issues that actually were litigated and determined. The requisite adversity exists "if, and only if, a cause of action or claim for relief by one co-party against the other was before the court, litigated between the co-parties, and adjudicated by a final judgment between them in the suit to which they were co-parties." 1B *Moore's Federal Practice* ¶ 0.411 [2] at 1282-83 (1982 ed.).

Claims cannot be precluded where parties are not aligned on opposite sides of litigation and there is no adversary relationship. "[T]he possibility of merger and bar [of claims] by definition does not arise" in that situation. *Restatement (Second) of Judgments, supra,* § 38, comment a. "[W]hen no cause of action between the co-parties was before the court, and was neither litigated between them nor adjudicated by the judgment, the judgment is not res judicata of any claim between the co-parties." 1B *Moore's Federal Practice, supra,* ¶0.411 [2] at 1282.

This is not a technical rule with obscure roots. It is an essential part of our adversary system of justice. Its rationale underlies the whole doctrine of res judicata. *See* 1 *Freeman on Judgments* § 422 (5th ed. 1925). *See also, Restatement of Judgments, supra,* § 82 comment a; *Restatement (Second) of Judgments, supra,* § 38, comment a.

Applying these settled principles, the Ninth Circuit had little difficulty concluding that the Tribe's claim against TCID is not precluded by operation of res judicata. There was no adversity between the Tribe and TCID in *Orr Ditch* because they were "non-parties who were represented simultaneously by the same government attorneys." PA 242a. The Court of Appeals could not and would not assume that the government "not only represented dual interests on the same side of a dispute, but . . . simultaneously, and with the same lawyers, represented those dual interests in a dispute between themselves." *Ibid.* Upholding res judicata under these circumstances would be "completely alien to our adversary system." *Ibid.* Since the Tribe and TCID were not adversaries and the fishery water right issue was not actually litigated and determined in *Orr Ditch* (PA 245a), TCID's res judicata defense was properly rejected. *Ibid.*

The application of this rule to this case precisely fits the practical, physical, legal, and historic realities of this controversy and of the *Orr Ditch* litigation. The real conflict is and always has been between the Tribe and TCID.

TCID diverts approximately half the flow of the Truckee River on a long-term average basis. There is virtually no return flow to the River because most of the water is conveyed to and then utilized in the Carson River watershed to the east. Depletions to the flow of the Truckee River resulting from TCID's diversions are more than 2½ times the combined total of all other depletions in both Nevada and California. A fifty percent reduction in TCID's diversions would be sufficient to provide enough water to maintain the present level of

Pyramid Lake. *See* the Tribe's Brief in Opposition to Certiorari at 2-3, 2a.[10]

TCID is not only the major diverter, for all practical purposes it has the most junior *Orr Ditch* priority. *See* TCID Br. at 8 n. 4; Tribe's Br. in Opposition to Certiorari at 1a; Nevada Br. at 3. This means that the Tribe's fishery water right with its earlier priority, PA 57a-58a, 201a, first would be satisfied out of the Newlands Project's entitlement. Water users with pre-1902 priorities would not be affected by the Tribe's right unless more water is needed to satisfy the requirements of the fishery even after all Truckee River diversions to the Newlands Project are eliminated. *See Colorado River Water Cons. Dist. v. United States*, 424 U. S. 800, 805 (1976). As noted above, that would not be necessary since Pyramid Lake can be stabilized with only fifty percent of the Truckee River flow that historically has been diverted to the Newlands Project.

These physical and legal realities were apparent to the government officials responsible for the *Orr Ditch*

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[10]TCID points out that the 375,000 to 400,000 acre feet needed to offset evaporation losses and to maintain the current level of Pyramid Lake is more than the entire flow of the River in some years. TCID Br. at 3. This is true, but it has no practical importance. The Lake needs an *average* annual inflow of 385,000 acre feet from the Truckee River in order to offset evaporation losses. It is receiving an average of approximately 250,000 acre feet, most of which flows into the Lake in wet years when it is not needed and cannot be diverted by anyone else. *See* PA 152a. *See also*, Nevada Br. at 49-50 n. 65. The Tribe and the United States do not seek 385,000 acre feet each and every year. The level of the Lake always has and always will decline in dry years and drought cycles. Pyramid Lake can be stablized by increasing Truckee River inflow during normal and wet years when it will have the least impact on other users. *See* PA 249a.

litigation. They knew that the water needed to satisfy the needs of the Pyramid Lake fishery was being diverted to the Newlands Project. PA 205a. And they recognized that *Orr Ditch* was not intended to be a final and binding adjudication of the Tribe's claimed fishery water right against TCID and the Newlands Project. The Commissioner of Reclamation specifically stated that his Bureau would "carefully guard against taking any action which would impair the right of the Indians" to water for fishing. PA 206a. Even more to the point, the Justice Department attorney responsible for *Orr Ditch* expressly stated his belief that the dispute between the Tribe and TCID was outside the scope of the lawsuit and that it should be settled administratively.

> Inasmuch as the Government has control of the Derby Dam, I have always thought that the Reclamation Service and the Indian Service, both bureaus of the Department of the Interior, could settle the matter [concerning water to be used for fish passing up and down the stream] between them as to providing the proper fishways and the comparatively small amount of water which may be needed to enable the fish to pass up the fishways.

PA 207a.[11]

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[11]Forty-two years later, the Interior Department finally attempted to resolve the problem. In 1967, the Secretary promulgated regulations, 43 CFR § 418, to "initiate Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights, and thereby make additional water available for delivery to Pyramid Lake." 43 CFR § 418.1(b). The regulations were predicated, in part, on the Secretary's "trust responsibility to protect and preserve the rights and interests of the Pyramid Lake Tribe of Indians in the Truckee River and in Pyramid Lake." They recognized that "[i]t is in the national interest that the fishery resource of Pyramid Lake be restored, that agricultural use be developed,

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Thus, the Court of Appeals' resolution of this case also conforms to the understanding and expectations of the government officials who were responsible for representing the interests of the Newlands Project and made the decision not to assert the fishery water right in the *Orr Ditch* litigation. That decision and the ensuing forty year delay in attempting to resolve the problem resulted in enormous benefit to TCID at the Tribe's expense. As its primary beneficiary, TCID is hardly in a position to complain about the government's lethargy.

TCID and Nevada argue that the Ninth Circuit's decision as to TCID should be reversed because it is based on outmoded and technical pleading requirements. Nevada Br. at 23, 28; TCID Br. at 22, 23. But they ignore the substantive realities of the *Orr Ditch* litigation and totally fail to come to grips with the central issue: how adversity can exist with regard to an unlitigated matter between two non-parties who are represented by the same party and the same attorneys? No case or other authority cited by the petitioners upholds the res judicata defense of one nonparty against another nonparty when both nonparties

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and that the water inflow to the Lake be such as to allow realization of the great potential thereof, including recreation." 43 CFR § 418.1 (b). And they terminated TCID's wasteful practice of diverting and releasing water for the single purpose of generating hydroelectric power during the winter months. 43 CFR § 418.4 (h). *See also, infra* at 45-49.

This lawsuit was initiated only after TCID stated that it would not comply with the Secretary's regulations, see Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 258 (D. D. C. 1973), and a Task Force composed of representatives of Nevada (including TCID), California, and the United States recommended judicial resolution of the controversy, see Brief of the United States in Opposition to Certiorari at 6-7 n. 8.

were purportedly represented by the same party and the issue was not actually litigated and determined.

Adversity in the legal sense exists only if parties have had an opportunity of litigating between themselves the correctness of a determination which is the basis of the judgment between them. PA 258a; *Restatement of Judgments, supra,* § 82, comment a; 1B *Moore's Federal Practice* ¶ 0.411[2], quoted *supra* at 14. The *Orr Ditch* case did not provide an opportunity for litigating the Tribe's claim to a fishery water right against TCID because neither Tribe nor TCID were parties, their conflicting interests were represented by the same party and the same attorneys, and the representative made a deliberate decision not to assert the Tribe's claim. Under these circumstances, there was neither adversity nor even a justiciable case or controversy with regard to that matter. *Williams v. Zbaraz,* 448 U.S. 358, 366-68 (1980); *Poe v. Ullman,* 367 U.S. 497, 505-07 (1961) (plurality opinion); *United States v. Johnson,* 319 U.S. 302 (1943); *Chicago & G.T.R. Co. v. Wellman,* 143 U.S. 339, 344-45 (1892); *American Wood Paper Co. v. Heft,* 75 U.S. (8 Wall.) 333 (1869); *Chamberlain v. Cleveland,* 66 U.S. (1 Black) 419 (1862); *Lord v. Veazie,* 49 U.S. (8 How.) 251 (1850); *United States v. Easement and Right of Way,* 204 F. Supp. 837, 838-40 (E.D. Tenn. 1962); *The Pietro Campanella,* 47 F. Supp. 374, 379 (D. Md. 1942). *See also,* the Tribe's Brief as Cross-Petitioner at 26-30 and *compare United States v. Federal Maritime Comm'n,* 694 F. 2d 793, 809-10 (D.C. Cir. 1982).

Nevada and TCID also argue that the actual conflict between the interests of the Tribe and TCID should be sufficient to overcome lack of adversity on the pleadings. Nevada Br. at 32-34; TCID Br. at 22-23. But "adversity" as used for res judicata purposes is not the same as an-

tagonistic or conflicting interests that might exist outside the courtroom. *See* PA 258A. There was no adversity between the Tribe and TCID in the legal sense because, "the government . . . never relinquished or limited its representation of the Project's interests," PA 245a;[12] there was no opportunity for the United States to litigate the Tribe's fishery water right against the conflicting claims also being pressed by the United States on behalf of the Newlands Project; and the issue was not, in fact, litigated and determined.[13]

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[12]Not only did the government never relinquish or limit its representation of the interests of the Newlands Project, but TCID never let the government forget that the United States had an obligation to the Newlands Project farmers who had purchased water rights from the government, were beneficiaries of the *Orr Ditch* rights decreed to the United States, and were represented by the government in *Orr Ditch*. *See, e. g.,* Exs. U-242, U-265 (post-1926 correspondence reproduced in the Appendix to this Brief). After 1926, the Pyramid Lake Indians had to contend not only with its conflict-ridden trustee, but also with the representatives retained by TCID to work with and influence the government's handling of *Orr Ditch* and other water matters affecting the conflicting interests of the Project and the Reservation.

[13]On numerous occasions throughout their Briefs, the petitioners make reference to the fact that the United States obtained more water for irrigation purposes for the Indians in the *Orr Ditch* Final Decree than was included in the 1926 Temporary Restraining Order. *See* TCID Br. at 10,42; Nevada Br. at 15, 17, 35, 44. Their apparent goal is to create the impression that the United States assumed a vigorous adversary stance on the Tribe's behalf vis-a-vis the interests of the Newlands Project after TCID was organized in 1926. The argument misses the mark for three reasons.

First, the Court of Appeals found that the United States "never relinquished or limited its representation of the [Newlands] Project's interests." PA 245a. That finding has not been challenged and is therefore conclusive. It certainly cannot be undercut or set aside by focusing on one isolated portion of the record from a 31 year legal proceeding. *See also, supra* at 12 n. 8, 20 n. 12.

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The Court of Appeals recognized that "[a] strict adversity requirement does not necessarily fit the realities of water adjudications," PA 241a, and was careful to limit

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Second, there is no dispute in this case concerning the Tribe's agricultural right. The Tribe and the United States are not seeking more water for agricultural purposes for the Reservation. Nor are they challenging the adequacy of the government's representation of the Tribe's interests with respect to that actually litigated and decided issue. Even if it could be said that the United States assumed a fully adversary position against TCID in *Orr Ditch* after 1926 with respect to the reservation's agricultural water right, that would not establish the requisite adversity with respect to the separate and distinct issue concerning the reservation's fishery water right. *Restatement (Second) of Judgments, supra,* § 38; *supra* at 13-14. And the evidence of record clearly demonstrates that the Interior Department made no effort to assert a fishery water right during the negotiations that led to the Truckee River Agreement. *See* PA 208a, JA 471-73.

Third, the petitioners have told only part of the story and conveyed a misleading impression. A review of all of the facts concerning the negotiations that led to the revision of the Tribe's agricultural water right in the Truckee River Agreement and the *Orr Ditch* Final Decree reveals that the government certainly was not a vigorous trustee. In fact, the record shows that the Tribe's agricultural water right was also subordinated to the competing claims of the Newlands Project.

The government's original agricultural claim for the Reservation had two components, the 3,000 or so acres of "bottom" lands along the Truckee River, most of which were being farmed by the Indians, and the "bench" lands, which were planned for development as part of the Newlands Project under the 1904 Amendment to the Reclamation Act. The total irrigable bench lands within the reservation comprised about 19,000 acres. Under the 1904 Act each Indian was to receive a 5 acre allotment. *See* PA 244 n. 21. The rest of the Reservation's irrigable acres included within the Newlands Project were to be opened to non-Indian settlement under the Reclamation Act. The government therefore decided to claim a reserved water right with an 1859 priority for about 3,000 acres of bench lands (5-acre allotments for 600 Indians). The remaining 16,000 acres of bench lands were included in the government's 200,000+ acre claim for the Newlands Project that carried a 1902 priority. PA 200a, 202a-03a.

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the effect of its ruling to the peculiar circumstances of this case, PA 241a-44a. By their very nature, water adjudication suits provide all parties with notice that all interlock-

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Under the 1926 Temporary Restraining Order, the Pyramid Lake Reservation was awarded reserved water rights for irrigation purposes for 3,130 acres of bottom lands with a water duty of 3.88 acre-feet per acre. In addition, the Order provided for an additional reserved right for the bench lands when and if they were allotted to the Pyramid Lake Indians with a water duty of 5.59 acre feet per acre. It was estimated at that time that there were 527 Indians. If the bench lands were subsequently allotted, there would be a reserved water right for approximately 2,635 acres. PA 12a-15a, 204a.

In 1934, during the negotiations that eventually led to the Truckee River Agreement, the Justice Department attorney responsible for the *Orr Ditch* litigation noted that Congress was considering a bill which, if enacted, would prohibit any further Indian allotments. Since the Pyramid Lake Reservation lands had not been allotted, and never would be if the bill became law, he suggested that the government's claim for a reserved water right for the bench lands be expanded to include all 19,000 irrigable acres within the Reservation. PA 209a. The bill, the Indian Reorganization Act, was passed in June 1934, 48 Stat. 984. Section 1, 25 U. S. C. § 461, expressly prohibited any future allotment of Indian lands.

The proposal advanced by the Justice Department attorney was vigorously opposed by TCID's attorney, Roy W. Stoddard, who later represented the United States when the Final Decree was entered in 1944. JA 478-80, 485. He objected to it on the grounds that it "would not only jeopardize and impair but would for all practical purposes destroy the water rights heretofore sold by the United States [for the bench lands along the Truckee Canal], and in addition would impair the now available water supply for the . . . lands [below Lahontan Reservoir]. Ex. U-265, reproduced in the Appendix to this Brief at App. 7-13. Stoddard added that the Justice Department's proposal "is . . . unfair and without equity to the settlers who have purchased water rights from the United States through the Bureau of Reclamation. . . ." *Ibid.*

In the end, after some bureaucratic shuffling, see Record on Appeal at vol. XXIII, pp. 4769-75, the government settled for agricultural reserved rights for 3,130 acres of bottom lands at

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ing water rights claims that are put forward are adverse, or at least potentially adverse, to each other. *See* Nev. Br. at 32-35; TCID Br. at 25-31. In these circumstances, the role of the pleadings is secondary. The adversity requirement is satisfied if the proceedings provide an opportunity for litigating the correctness of all of the claims that are asserted in the litigation. *See* PA 259a.

This case is different and almost certainly unique because: (i) the Tribe and TCID were not parties; (ii) the Tribe did not have any notice, by way of pleadings or otherwise, that any claims were being made in *Orr Ditch* that were adverse to its claim to a fishery water right;

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4.71 acre feet per acre (as compared to 3,130 acres at 3.88 acre feet per acre in the Temporary Restraining Order) and 2,745 acres of bench lands at 5.59 acre feet per acre (as compared to 2,635 acres at 5.59 acre feet in the Temporary Restraining Order.) PA 57a-58a. The net "gain" was an increase of 110 acres of benchlands and less than 1 acre foot per acre for 3,130 acres of bottom lands, approximately 4,000 acre feet in all. But at the same time the government surrendered its reserved rights agricultural claim to 16,255 acres of tribally owned bench lands, a loss of approximately 90,000 acre feet. Even though the Indian Reorganization Act had become law more than a year before the Truckee River Agreement was finalized, the reserved water right for the reservation bench lands was based on the repealed allotment provision in the 1904 Act. Ex. B-326.

The stated reason for rejecting the 19,000 acre claim was "doubtful feasibility from all standpoints, including that of water supply. . . ." *See* PA 209a-10a. There was no explanation of why it was thought to be feasible from a water supply standpoint to claim a water right with a 1902 priority for 200,000+ acres, but not to assert a reserved right with an 1859 priority to the same water source for 16,000+ acres. One would have thought that the claim with the earlier priority would be more feasible because it would take precedence in times of shortage.

While it is undoubtedly true that something (4,000 acre feet) is better than nothing (zero for the fishery), the 19,000 acre episode demonstrates that the government's post-1926 representation of the Tribe's agricultural water right was certainly not that of a vigorous advocate.

(iii) the Tribe was not provided an opportunity to obtain an attorney to represent its interests who was capable of advancing its claim to a fishery water right with undivided loyalty; (iv) the Tribe did not have an opportunity to protect itself from representation by attorneys burdened with a massive conflict; (v) the fishery water right claim was not asserted or determined; and (vi) there was no opportunity for litigating the correctness of that matter between the Tribe and TCID whose conflicting interests were represented by the same party and the same attorneys. These factors limit the effect of the Ninth Circuit's holdings to the circumstances of this case.

Since the Tribe and TCID were not courtroom adversaries in *Orr Ditch*, they can only be bound by issues that were actually litigated and determined. The possibility of claim preclusion simply does not arise.

TCID's invocation of res judicata highlights the truly anomolous character of that defense in this suit. TCID, which was not a party in the *Orr Ditch* case, claims to be in privity with the United States for the purpose of applying res judicata against another nonparty, the Pyramid Lake Tribe, which TCID claims is also in privity with the United States. With the possible exception of the District Court's decision in this case (which is explainable on other grounds), we do not know of another instance in which nonparties with conflicting claims were held to be bound by virtue of their being in privity with the same party. The very idea and definition of privity negate its application in these circumstances. *See Expert Electric Inc. v. Levine*, 554 F. 2d 1227, 1233-34 (2d Cir. 1977), *cert. denied*, 434 U.S. 903; *Southwest Airlines Co. v. Texas Internat'l Airlines*, 546 F. 2d 84, 95, 102 (5th Cir. 1977), *cert. denied*, 434 U.S. 832; *Gerrard v. Larsen*, 517 F. 2d 1127,

1133-35 (8th Cir. 1975) ("privity" exists only when the interests of the representative "precisely coincides" with those of the non-party or when the representative has the non-party's interest "foremost in mind"); *Restatement of Judgments* § 83, comment a (1942).

III.

The Tribe's Fishery Water Right Has Not Been Extinguished By the Truckee River Agreement.

TCID urges as an alternate ground for reversal of the Court of Appeals' decision that the Tribe's fishery water right has been extinguished by the Truckee River Agreement considered solely as a contract rather than as part of the *Orr Ditch* decree. TCID Br. at 42-48. This issue is not properly before the Court and would not be ripe for determination even if it were. If the merits are considered, TCID's arguments are flawed in numerous respects.

Pursuant to the defendants' motion, the trial of this case was bifurcated pursuant to Rule 42(b), Fed. R. Civ. P. The initial trial was limited to the affirmative defenses of res judicata and collateral estoppel. JA 192-93, 205-06. Consequently, at this interlocutory stage this case is limited to determining effect of the *Orr Ditch* Final Decree on the Tribe's claimed water right for fishery purposes. Whatever independent force the Truckee River Agreement might have is beyond the scope of the District Court's bifurcation Order and therefore cannot be considered in this appeal.

TCID's argument is also precluded because it was not presented below. *Delta Air Lines, Inc. v. August,* 450

U. S. 346, 362 (1981); *United States v. Ortiz*, 422 U. S. 891, 898 (1975).[14]

Even if the issue had been encompassed in the bifurcation order and argued to the Court of Appeals, it should not be considered because the lower courts did not construe the Truckee River Agreement as an extinguishment, or an attempted extinguishment, of the Tribe's fishery water right. The Agreement does not even mention or refer to that right. The District Court held that the fishery water right had been extinguished by the government's acts and omissions prior to 1934, PA 179a, so there was no occasion for it to consider the effect of subsequent events.

Contrary to TCID's characterization (Br. at 43), footnote 10 of the Court of Appeals' Opinion does not deal with the "independent force" of the Truckee River Agreement. There is no mention of the Agreement in either the footnote or the accompanying text. TCID's position is inconsistent with the Ninth Circuit's statement that 25 U. S. C. §§ 2 and 9 cannot be used to uphold the "valid[ity of] the Secretary's conduct *in Orr Ditch*." PA 222a n. 10, emphasis added.[15] The legal issue now posed by TCID

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[14]The sole question presented by TCID in its Brief to the Ninth Circuit was "[w]hether appellants' instant claim for a reserved water right for fishery purposes with an 1859 priority is barred by the final decree entered in the case of United States of America v. Orr Water Ditch Co., et al., Equity No. A-3 in the United States District Court for the District of Nevada on September 8, 1944."

[15]The Ninth Circuit's treatment of this issue tracks the arguments made in TCID's Brief. The *Ahtanum* decisions and 25 U. S. C. §§ 2 and 9 were used by TCID to buttress its contention

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plainly is not ripe for review in the absence of an authoritative interpretation of the Truckee River Agreement by the lower courts. *Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27, 50-51 (1980); *Hatzlachh Supply Co. v. United States*, 444 U. S. 460, 466 (1980); *Connecticut Light & Power Co. v. FPC*, 324 U. S. 515, 532-35 (1945).

Notwithstanding these threshhold hurdles, if the Court is inclined to consider the merits, the initial question is whether the Truckee River Agreement can be considered an attempted extinguishment of the Tribe's fishery water right. As previously noted and in contrast to the agreement at issue in the *Ahtanum* litigation,[16] the Truckee River Agreement does not even mention or allude to the water requirement or entitlement for the Pyramid Lake fishery. Extrinsic evidence shows that the government deliberately kept the fishery water rights claim outside the scope of both the *Orr Ditch* litigation and the negotiations concerning the Truckee River Agreement. PA 207a, 208a. Other extrinsic evidence demonstrates that in 1930 the Attorney General stated in a letter to the Secretary of the Interior that "he was not aware of any authority authorizing the Secretary of the Interior or any officials of the Government under him to enter into a compromise settlement of [Indian water right] controversies

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that the Secretary's subordination of the Tribe's fishery water right to the interests of the Newlands Project in *Orr Ditch* was authorized by the 1902 Reclamation Act as construed in Henkel v. United States, 237 U. S. 43 (1915). See TCID's Brief in the Ninth Circuit at 48-54.

[16]United States v. Ahtanum Irrig. Dist., 236 F. 2d 321 (9th Cir. 1956), *cert. denied*, 352 U. S. 988 (Ahtanum I), opinions on remand, 330 F. 2d 897 (9th Cir. 1968), 338 F. 2d 307 (9th Cir. 1964), *cert. denied*, 381 U. S. 924 (Ahtanum II).

. . ., whether the same be effected as a compromise of a suit or otherwise." *Ahtanum I, supra,* 236 F. 2d at 330-31 n. 12. It is ludicrous to suggest that the Secretary of the Interior and the Attorney General[17] entered into the Truckee River Agreement with the intent to extinguish the Pyramid Lake Tribe's water rights when the Attorney General had previously concluded that such an agreement would be illegal. *See FCC v. Schreiber,* 381 U. S. 279, 296 (1965).[18]

Thus, considered solely as a contract, the silence of the Truckee River Agreement combined with the surrounding circumstances negate any possible inference that the Tribe's fishery water right was encompassed in the agreement to settle the *Orr Ditch* litigation. Still less can the Agreement be construed as the "clear and plain indication" of an intent to extinguish Indian property rights that is required "in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *United States v. Santa Fe Pacific R. Co.,* 314 U. S. 339, 353-54 (1941). *See also, Menominee Tribe v. United States,* 391 U. S. 404, 412-13 (1968); *Alaska Pacific Fisheries v. United States,* 248 U. S. 88, 89 (1919); *Winters v. United States,* 207 U. S. 564, 576, 577 (1908); PA 217a-18a.[19]

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[17]The Truckee River Agreement was approved "as to form" by the Secretary of the Interior in July, 1935. TCID App. A-110. It was approved by the Attorney General in February, 1936. Ex. B-365.

[18]In addition, prior to approving the Truckee River Agreement, the Attorney General was advised that it would not jeopardize the Reservation's water right. *See supra,* at 12 n. 8.

[19]It is not clear what TCID hopes to accomplish by its reliance on the Truckee River Agreement considered as separate

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Assuming *arguendo* that the Truckee River Agreement can be construed as attempted extinguishment of the Tribe's fishery water right, the next question is whether the Secretary has been delegated that power by the Congress in the specific circumstances of this case. The Court of Appeals expressly held that "the Reclamation Act [does not] confer authority to acquire water for a reclamation project by extinguishing federal water rights reserved for other purposes." PA 217a. Petitioners do not take issue with this holding. But TCID contends that

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and distinct from the *Orr Ditch* decree. Since the Agreement was the vehicle for achieving a settlement of the *Orr Ditch* litigation and was incorporated in the *Orr Ditch* decree, see TCID Br. at 9-10, 42; PA 143a-44a, it is difficult to conceive how it could have been intended to include a matter that was neither mentioned in the Agreement nor placed at issue in the litigation. Standing alone, without reference to the doctrine of res judicata and the subsidiary principles of merger and bar, there is no basis for linking the Agreement and the Tribe's fishery water right.

Insofar as TCID hopes to use the contractual force of the Truckee River Agreement to circumvent the Tribe's due process argument, it is engaged in a futile effort. Administrative agencies are also bound by the Constitution to provide notice and an opportunity to be heard to those who stand to be adversely affected by their actions. Hodel v. Virginia Surface Mining and Reclamation Ass'n., 452 U. S. 264, 298-303 (1981); Mathews v. Eldridge, 424 U. S. 319, 348-49 (1976); FCC v. Pottsville Broadcasting Co., 309 U. S. 134, 143-44 (1940). This rule applies to Indians no less than to others. Duncan Townsite Co. v. Lane, 245 U. S. 308, 310 (1917); United States ex rel. Turner v. Fisher, 222 U. S. 204 (1911). *Cf.* Morton v. Ruiz, 415 U. S. 199, 232, 236 (1974). Indeed, in 1934 Congress enacted legislation specifically vesting tribal officials with the power to prevent the United States from disposing of tribal property without first obtaining tribal consent. *See* 25 U. S. C. § 476; 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs from 1917 to 1974* 657 (GPO); F. Cohen, *Handbook of Federal Indian Law* 326 n. 381, 516 n. 17 (1982 ed.).

notwithstanding this express limitation on the Secretary's authority in the statute governing the acquisition of water rights for federal reclamation projects, the Secretary can achieve the identical, prohibited result pursuant to the general delegation of authority to manage Indian affairs, 25 U. S. C. §§ 2, 9. Any such construction of these related laws is precluded by the rule that the terms of the more specific statute take precedence over the more general one. *Busic v. United States*, 446 U. S. 398, 406 (1980); *Radzanower v. Touche Ross & Co.*, 426 U. S. 148, 153 (1976).

It is only after all of these obstacles have been cleared that the only question presented and briefed by TCID is reached. Contrary to its contention, the statutes delegating broad general authority to manage Indian affairs, 25 U. S. C. §§ 2 and 9, do not empower the Secretary to extinguish Indian property rights. The power to convey Indian property must be bestowed by specific grants; general delegations of authority do not suffice. 25 U. S. C. § 177; *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661, 667-74 (1974); *Sioux Tribe v. United States*, 316 U. S. 317, 326 (1942); *United States v. Santa Fe Pacific Railroad Co., supra*, 314 U. S. at 353-56; *Cramer v. United States*, 261 U. S. 219, 234 (1923). *See also*, 18 Op. Att'y Gen. 235, 238 (1885), *cited with approval in Pueblo of Santa Rosa v. Fall*, 272 U. S. 315, 321 (1927). *See generally*, F. Cohen, *Handbook of Federal Indian Law* 510-22 (1982 ed.). This fundamental principle is recognized in all of the laws that specifically grant power to the Secretary to approve leases of Indian lands. *See, e. g.*, 25 U. S. C. §§ 396a, 397, 415.

25 U. S. C. §§ 2 and 9 do not delegate general authority over Indian tribes and their property to the Secretary.

Organized Village of Kake v. Egan, 369 U. S. 60, 63 (1962). *Cf. United States v. Mitchell*, 445 U. S. 535 (1980); *United States v. Powers*, 305 U. S. 527 (1939). Nor do they overcome the constraints imposed by other laws such as the Nonintercourse Act, 25 U. S. C. § 177, and the Indian Reorganization Act, 25 U. S. C. § 476.

TCID's reliance on the Ninth Circuit's *Ahtanum* decision is misplaced. TCID entirely ignores *Ahtanum II* which expressly disclaimed TCID's construction of *Ahtanum I*. 330 F. 2d at 902-03. As so limited, *Ahtanum* is a narrow decision, expressly confined to adjustments between adjacent landowners with competing rights along a boundary stream.[20] The facts of this case, involving two conflicting federal interests, a trans-basin diversion, a federal reclamation project whose water rights were acquired pursuant to Section 8 of the 1902 Reclamation Act, and a clear and unquestioned superior Indian water right (*see supra* at 5 n. 2) that was actually being exercised prior to the alleged conveyance (PA 199a, 204a-05a), are vastly different. The *Ahtanum* holding cannot be extended to extinguish an Indian water right which is not mentioned in the instrument in which it was allegedly conveyed, was not involved in any of the negotiations leading to that agreement, and for which no trust responsibility

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[20]Even within the Ninth Circuit, the *Ahtanum* precedent stands as an isolated exception to the general rules that the Secretary cannot make any transfer or disposition of Indian property without express congressional sanction and that the authority delegated by 25 U. S. C. §§ 2 and 9 is limited to the implementation of other specific laws. *See, e. g.*, United States v. Southern Pacific Transportation Company, 543 F. 2d 676, 690 (9th Cir. 1976); Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655, 665-66 (9th Cir. 1975), *cert. denied*, 352 U. S. 834; United States v. West, 232 F. 2d 694, 698 (9th Cir. 1956), *cert. denied*, 352 U. S. 694.

was assumed. To have abandoned the Tribe's claim without negotiating for anything in return "would not be an exercise of guardianship, but an act of confiscation." *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 113 (1919). This Court's decisions foreclose any contention that the Secretary of the Interior has been authorized to alienate or to make gifts or donations of trust or restricted Indian property. *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 372 (1968); *Mott v. United States,* 283 U.S. 747, 751 (1931). *See also,* Part V, *infra.*

The petitioners' case for reversal must rise or fall on the merits of their res judicata defense. TCID's belated effort to peg the extinguishment of the Tribe's fishery water right on the independent force of the Truckee River Agreement is fatally flawed, both procedurally and substantively.

IV.

Nevada Lacks Standing To Petition On TCID's Behalf.

The government's Complaint in this case designated Nevada as a defendant in three distinct capacities, proprietary, governmental, and as parens patriae for its citizens. PA 152a. Over the objections of the United States and the Tribe, the District Court granted Nevada's motion to dismiss it in its parens patriae capacity. JA 207-10.

Nevertheless, Nevada now purports to reappear as parens patriae for the purpose of challenging the decision below insofar as it is adverse to TCID. Nev. Pet. at 9; Nev. Br. at 22 n. 25. Although Nevada states that it can act in its parens patriae capacity at any time it chooses, Nev. Pet. 9 n. 4, we do not know of any order, rule, or decision that permits a party to change or add roles, *sua*

sponte, at its whim. *Contrast* Fed. R. Civ. P. 21. Accordingly, Nevada's Petition, No. 81-2245, should be summarily dismissed because Nevada lacks standing to petition on TCID's behalf.

V.

The Pyramid Lake Tribe's Water Right Cannot Be Extinguished By Federal Officials Who Have Failed To Assume Or To Fulfill Their Fiduciary Obligations.

The petitioners seek to gain some advantage from the acts and the silence of the Congress. *See, e. g.*, TCID Br. at 34; Nev. Br. at 35. Neither position is tenable for obvious reasons.[21] Moreover, the petitioners ignore the most

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[21]Nevada urges the view of the Court of Appeals' dissenter that the Tribe's case has somehow been prejudiced because the problem was brought to the attention of a congressional subcommittee holding oversight hearings and no action was subsequently taken by the Congress. But courts are the traditional forums for adjudicating water rights and for determining the preclusive effects of prior judgments. While the Pyramid Lake problem has certainly been mentioned in congressional oversight hearings, no legislation has been introduced to settle it one way or the other. Indeed, the two Senators who conducted the oversight hearings expressly stated their belief that the controversy should be resolved by the courts, not by the Congress. 119 Cong. Rec. 1018 (1973), reproduced in the Appendix to the Tribe's Brief in Opposition to Certiorari at 10a-11a. Under these circumstances, nothing can be read into the lack of congressional action. No authority known to us or cited by Nevada or the dissenter holds or suggests that courts should give any consideration to the fact that a case or controversy is mentioned in congressional oversight hearings.

TCID's reliance on the policies underlying the McCarran Amendment, 43 U. S. C. § 666, as applied in Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976), is just as obviously misplaced. That law was enacted in 1952, eight years after the entry of the *Orr Ditch* final decree, thirty-nine years after *Orr Ditch* was initiated. Applying that statute retroactively to divest the Tribe of its property rights

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relevant considerations—the legal relationship between Indian tribes and the United States and the obligations and constraints imposed on federal officials who exercise authority over Indian property rights.

The United States holds the Pyramid Lake Indian Reservation in trust for the Pyramid Lake Paiute Tribe. PA 182a, 199a. *See Wilson v. Omaha Indian Tribe*, 442 U. S. 653, 657 n. 1 (1979). *See also, Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F. 2d 370 (1st Cir. 1975) (Nonintercourse Act, 25 U. S. C. § 177, imposes fiduciary responsibility on federal officials to protect Indian property). In that capacity, the United States is entitled to appear in court to enforce and protect the rights of Indian tribes as property owners and as sovereigns. *Id.; Moe v. Confederated Salish & Kootenai Tribes*, 425 U. S. 463, 473-74 (1976); *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 812 (1976) (United States has responsibility to defend fully Indian water rights); *United States v. Minnesota*, 270 U. S. 181, 193-95 (1926); 25 U. S. C. § 175.

While extensive, the powers of the federal government over Indian affairs are not unlimited. Even the powers of Congress are subject to constitutional restraints. *United States v. Sioux Nation of Indians*, 448 U. S. 371, 408, 413-15 (1980); *Delaware Tribal Business Comm. v. Weeks*, 430 U. S. 73, 84 (1977). More to the point for

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violates the first rule of statutory construction. United States v. Security Industrial Bank, 103 S. Ct. 407 (1982); Greene v. United States, 376 U. S. 149, 160 (1964). *See also*, Tribe's Brief as Cross-Petitioner at 25, 34-36.

As noted *supra* at 6, the petitioners have abandoned their reliance on the 1902 and 1904 Reclamation statutes.

our purposes, the acts and omissions of executive officials are subject to the most exacting fiduciary standards. *See, e. g., Morton v. Ruiz,* 415 U. S. 199, 236 (1974); *Seminole Nation v. United States,* 316 U. S. 286, 296-97 (1942). In particular, government officials are charged with exercising all of their powers to protect Indians in the possession and enjoyment of their property. *United States v. Rickert,* 188 U. S. 432, 443 (1903). Thus, in *Lane v. Pueblo of Santa Rosa,* 249 U. S. 110, 113 (1919), the Court held that an Indian tribe could enjoin the Secretary of the Interior from disposing of Indian lands under the public land laws because "[t]hat would not be an exercise of guardianship, but an act of confiscation." Put another way, "[s]poliation is not management." *Shoshone Tribe v. United States,* 299 U. S. 476, 498 (1937), quoted with approval in *United States v. Sioux Nation of Indians, supra,* 448 U. S. at 408. As summarized in *Chippewa Indians v. United States,* 301 U. S. 358, 375-76 (1937):

> Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own.

Congress can, of course, authorize the termination or abandonment of its trust relationship. *Jones v. Prairie Oil & Gas Co.,* 273 U. S. 195, 199 (1927); *United States v. Waller,* 243 U. S. 452, 459-60 (1917); *Tiger v. Western Investment Co.,* 221 U. S. 286, 315 (1911); *United States v. Rickert,* 188 U. S. 432, 443, 445 (1903). But federal officials cannot arrogate this responsibility onto themselves. *United States v. Santa Fe Pacific R. Co.,* 314 U. S. 339,

355-56, 360 (1941); *Cramer v. United States*, 261 U. S. 219, 234 (1923). When they purport to do so, their actions are *ultra vires* and cannot affect the Indians' pre-existing rights. *Ibid.*

The Tribe does not dispute the established rule that when the federal government appears in litigation in its representative capacity as trustee for Indian interests, both the United States and the Indian beneficiaries are normally bound by the resulting decree. *United States v. Candelaria*, 271 U. S. 432 (1926); *Heckman v. United States*, 224 U. S. 413 (1912). But that principle has no utility where the responsible federal officials have not assumed or carried out their congressionally imposed fiduciary obligations. *See, e. g.*, PA 236a n. 18 (distinguishing *Heckman*). Congress has reserved to itself the exclusive authority to alienate or extinguish Indian property rights and to impose appropriate standards, restraints and conditions on the officials empowered to exercise that authority. 25 U. S. C. § 177; *Oneida Indian Tribe v. County of Oneida*, 414 U. S. 661 (1974). It has not sanctioned the loss or diminishment of Indian property rights by unauthorized acts and omissions of federal officials who have totally disregarded and failed to carry out the fiduciary duties imposed by the Congress. As stated in *Cramer v. United States, supra*, 261 U. S. at 234:

> Since these Indians, with the consent of the government, had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to deal with the land upon any other theory.

See also, Joint Tribal Council of the Passamaquoddy Tribe v. Morton, supra, 520 F. 2d 370, affirming 388 F. Supp. 649 (D. Me. 1975) (Gignoux, J.) *Cf. Schweiker v. Hansen*,

450 U. S. 785 (1981) (per curiam); *United States v. California*, 332 U. S. 19, 40 (1940) (government property cannot be forfeited as a result of its agents acquiescence, laches or failure to act); *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408-09 (1917).[22]

A useful analogy is provided by *United States v. Sioux Nation of Indians*, 448 U. S. 371 (1980). *Sioux Nation* held that Congress cannot simultaneously act in its capacity as trustee for the benefit of Indians and as sovereign exercising its power of eminent domain to take Indian property for other governmental purposes. 448 U. S. at 408-09, 416-17 (quoting and approving *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 553, 390 F. 2d 686, 691 (1968)). To determine whether Indian property has been taken for purposes of the just compensation clause of the Fifth Amendment, the test is whether Congress made a good faith effort to give the Indians the full value of their land resulting in the transmutation of Indian property from land to money. *Id.* The *Sioux Nation* Court concluded that Congress had not made such a good faith effort and the Indians were therefore entitled to just compensation for the taking of the Black Hills. 448 U. S. at 417-21.

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[22]For these reasons, courts should be reluctant to uphold claims that valuable, unlitigated property rights belonging to the government or Indians have been lost because they were not asserted by the government's attorneys. *See, e. g.*, United States v. Pan-American Petroleum Co., 55 F. 2d 753, 776, 782 (9th Cir. 1932), *cert. denied*, 287 U. S. 612 (rule against splitting a cause of action should be interpreted liberally in favor of the sovereign and should be particularly relaxed where the sovereign is seeking to vindicate important public policies). *See also*, Brief of Amici Curiae Sierra Club, et al.; Tribe's Brief as Cross-Petitioner at 20-22.

Unlike *Sioux Nation*, this case does not involve either an examination of Congress' action or a claim for just compensation. *See* PA 233a-34a. Instead, the question is the extent to which Indian property rights can be diminished or lost as a result of the government's improper and inadequate representation of the Indians' interest in judicial proceedings. *Sioux Nation* provides an appropriate analytic framework for addressing this issue.

Here, as in *Sioux Nation*, the inquiry is factual in nature and requires a thoroughgoing and impartial examination of the historical record. 448 U. S. at 415-16. Courts should not be permitted to second-guess, from the perspective of hindsight, strategic decisions made by government litigators or to judge the quality of their performance. The critical questions should be whether the government has made a good faith effort to defend, protect and preserve the Indian property right that is claimed to be encompassed in and foreclosed by a prior decree and whether its conduct was motivated and can be explained by its responsibility as guardian to further the Indians' best interests.[23]

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[23]A different rule is not required simply because courts will be called upon to review the conduct of government attorneys in judicial proceedings. Attorneys General, like Presidents, are not above the law. United States v. Nixon, 418 U. S. 683, 705-07, 714-15 (1974); Berger v. United States, 295 U. S. 78, 88 (1935); United States v. Beebe, 180 U. S. 343, 351-53 (1901). This Court has not shied away from subjecting the government's litigation decisions to judicial scrutiny. Dunlop v. Bachowski, 421 U. S. 560, 567 n. 7 (1975); *approving* Bachowski v. Brennan, 502 F. 2d 79, 86-88 (2d Cir. 1974). *See also*, Marshall v. Jerrico, Inc., 446 U. S. 238, 249 (1980); Nat'l Railroad Passenger Corp. v. Nat'l Ass'n of RR Passengers, 414 U. S. 453, 465 (1974) (Brennan, J. concurring). The Attorney General is no less bound to carry out congressional Indian policy than are all other government officers and agents. *See* Cramer v. United States, quoted *supra* at 36.

No Act of Congress has ever terminated the Pyramid Lake Tribe's property right to sufficient water for the Pyramid Lake fishery. Indeed, when Congress was informed that the trout fishery had been destroyed by diversions to the Newlands Project, it responded by mandating its restoration. 43 U. S. C. § 614c; H. R. Rept. No. 2055, 84th Cong., 2d Sess. 4-5 (1956), reprinted in 1956 *U. S. Code Cong. & Ad. News*, 3755, 3758. *See* PA 208a, 246a-47a, 256a-57a. Nor has Congress ever authorized federal officials to abandon their fiduciary obligations to the Tribe, to give the Tribe's fishery water right to others, or to deal with it as if it belonged to the government. PA 214a-22a.

Yet the record is clear that throughout the entire *Orr Ditch* litigation, the responsible federal officials deliberately failed to assert a fishery water right on the Tribe's behalf, PA 198a, 204a-08a, and subordinated the Tribe's claim to a fishery water right to the "larger interests" of the Newlands Reclamation Project, PA 185a. Government officials "compromised [their] duty of undivided loyalty to the Tribe," PA 242a, acted like a "faithless fiduciary," PA 239a, and totally failed to assume or to carry out their trust responsibility to defend, preserve and protect the Tribe's fishery water right. A diminution or extinguishment of the Tribe's property cannot be predicated on these *ultra vires* acts and ommissions. *United States v. Santa Fe Pacific R. Co., supra; Cramer v. United States, supra.* Just as Congress' guardianship responsibilities cannot detract from the Indians' right to receive just compensation for the taking of their protected property interests, *United States v. Sioux Nation of Indians, supra,* so too executive officials cannot be allowed to work an ex-

tinguishment or forfeiture of invaluable Indian rights by acting as if they do not exist or by completely ignoring their fiduciary responsibilities.

The fiduciary obligations of federal officials are reinforced by Section 16 of the Indian Reorganization Act of 1934, 25 U. S. C. § 476, which expressly grants Indian tribes the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . ." The Constitution of the Pyramid Lake Tribe delegates this power to the elected Tribal Council. Ex. V-17 at 2-3. The overriding purpose of the Act "was to establish machinery whereby Indian Tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U. S. 535, 542 (1974). *See also, Id.*, at 553. The restrictions imposed by Section 16 on the disposition of tribal property were specifically designed to achieve this overall purpose by restraining federal officials from acting on their own. S. Rept. No. 1080, 73d Cong. 2d Sess. 1 (1934); 78 Cong. Rec. 11731 (1934); 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs from 1917 to 1974* 657 (GPO); F. Cohen *Handbook of Federal Indian Law* 326 n. 381, 516 n. 17 (1982 ed.).

As discussed in Part VI, *infra*, at this point it is impossible to determine the ultimate effect of the Tribe's fishery water right on TCID or others. Assuming *arguendo* that the end result will be inequitable or even manifestly unjust, the remedy lies with the Congress. *See, Kleppe v. New Mexico*, 426 U. S. 529 535-41 (1976); *Cappaert v. United States*, 426 U. S. 128, 138-39 & n. 4 (1976);

Northern Cheyenne Tribe v. Hollowbreast, 425 U. S. 649 (1976). The obligation of this Court is to resolve the legal issues after which Congress will be able to consider and, if necessary, implement measures to cushion their impact. "[W]e cannot and do not assume that Congress . . . will execute its powers in such way as to bring about injustices. . . ." *United States v. California*, *supra*, 332 U. S. at 40.[24]

In recent years, Congress and the executive have demonstrated that they are ready, willing and able to formulate, enact, and implement creative legislative solutions to meet the legitimate needs and expectations of both Indians and non-Indians to scarce and critical water resources. *See, e. g.*, 96 Stat. 1261, 1274-85 (1982) (Papago water rights settlement); 92 Stat. 409 (1978) (Ak-Chin water rights settlement). *See also*, 128 Cong. Rec. H. 3130 (daily ed. 1982), reprinted in July 1982 *U. S. Code Cong. & Ad News* No 5, D. 49 (Presidential veto of earlier Papago water rights legislation pledging the full cooperation of the Administration to the State and local governments that are facing the difficult task of equitably resolving Indian water rights suits); F. Cohen, *Handbook of Federal Indian Law* 202, 597-98 & n. 5 (1982 ed.). Indeed, Senator Laxalt and the Bureau of Reclamation have already advanced similar proposals to settle the Pyramid Lake controversy. *See* 128 Cong. Rec. S. 4826 (daily ed. 1982), discussed *infra* at 44 n. 26. In addition, Congress has directed the Secretary of the Interior and irrigation districts (such as TCID) to develop and implement water conservation mea-

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[24]Proving Justice Black's point, Congress responded to the decision in United States v. California, *supra*, by enacting the Submerged Lands Act, 43 U. S. C. §§ 1301 *et seq.*

ures on federal reclamation projects. 96 Stat. 1261, 1268 (1982).

In any event, such matters are properly the concerns of the political branches. So far as this pending case or controversy is concerned, the bottom line is that extinguishment of the Tribe's fishery water right cannot be predicated on unauthorized acts and omissions that are inconsistent with the obligation of federal officials to defend, protect and preserve Indian property that never has been declared forfeited by the Congress.

VI.

The Impact of the Tribes' Right and of the Court of Appeals' Decision is Speculative.

Nevada contends that extraordinary, incalculable unfairness and hardship will be visited upon TCID if the Ninth Circuit's decision is upheld. Nevada Br. at 48-50. This claim is not supported by any findings. In fact, the interlocutory posture of this case, the pendency of several other cases, and other unresolved contingencies make it impossible to determine the impact of the Tribe's fishery water right on TCID and other users of Truckee River water.

A large part of the lengthy trial in this case was consumed by the testimony of fish biologists and hydrologists concerning the fishery's water requirements, how those requirements could be met, and what impact they would have. Needless to say, the experts did not agree. Those who testified for the defendants were of the opinion that the fishery could get by with the amount of water that it is presently receiving (*see e. g.*, Nevada Br. at 49-50 n. 65;

TCID Br. at 14 n. 9; 31 Tr. 5934) and that any increase in that amount would adversely affect other users. On the other hand, the experts for the Tribe and the United States testified that the fishery needed more water but that the fishery water right would have its least impact in dry years when water is most scarce and that the necessary additional water could be made available through eliminating waste. *See* PA 248a-49a; 16 Tr. 2649-54, 2701-02, 2712, 2725, 2732, 2735-36; 21 Tr. 3500-01, 3597-98, 3601-04, 3618, 3643-45. The District Court considered these conflicting opinions and made the following finding:

> That the plaintiff and the Tribe have failed to sustain their burden of proof by evidence of sufficient quality and credibility to prove that no harm or "hurt" will be sustained to the vested legal rights of priority water right holders under the *Orr Ditch* final decree if an 1859 right is superimposed over all the other *Orr Ditch* decreed rights for certain minimum flow into the Truckee River for spawning and flow into Pyramid Lake.

TCID App. A-107.[25]

The fact that the United States and the Tribe did not prove that no one will ever suffer any harm hardly establishes that TCID or anyone else will suffer "incalculable hardship." The District Court did not even find that the defendants had established by a preponderance of the evidence that any of them would ever be harmed if the fishery water right is ultimately decreed. Indeed, if on remand the defendants are able to prove their claim that the fishery is thriving and does not need any more water, *see, e. g.*, Nevada Br. at 49-50 n. 65; TCID Br. at 14 n. 9,

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[25]Parts of this finding are omitted in Nevada's Appendix, 191a.

this litigation will not result in any changes from the status quo.

The Court of Appeals discussed the impact of its decision on TCID. It stated that TCID could achieve "substantial efficiencies" that would ameliorate any possible hardship. PA 245a.[26] It also noted that TCID receives much of its water from the Carson River, which is not affected by this litigation, and that TCID and its members may have a damage remedy against the United States for breach of contract if any injuries are sustained. PA 245a-46a. Finally, the Court pointed out the flexible nature of the fishery water requirement and expressed hope that a solution could be formulated on remand that will minimize hardships on all water users. PA 249a.

The forecast of "incalculable hardship" is, to say the least, premature. It is unsupported by the district court's decision and refuted by the opinion of the Court of Appeals.

The ultimate impact of the Tribe's water right on TCID and others will also depend on the outcome of several other legal proceedings. Thus far, the United States and the Tribe have successfully defended their right to use water from Stampede Reservoir for the fishery's benefit. *Carson-Truckee Water Conservancy District v. Watt*, 549 F. Supp. 704 (D. Nev. 1982), *appeals pending*. The

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[26]This conclusion is reinforced by Senator Laxalt's proposal to reduce TCID's demand by 77,000 acre feet annually, 46,000 acre feet of which would be saved through the Bureau of Reclamation's proposed Rehabilitation and Betterment Program. See 128 Cong. Rec. S. 4826 (May 11, 1982) (daily ed.), reproduced in the Tribe's Brief in Opposition to Certiorari at 11a-12a. See also, *supra* at 41-42.

Tribe and the United States are also seeking to devote the unused portion of the Tribe's *Orr Ditch* decreed agricultural water right (approximately 25,000 acre feet per year) to fishery purposes and to halt excessive diversions to the agricultural lands surrounding Reno and Sparks. *See* the Tribe's Brief in Opposition to Certiorari at 7 nn. 11 & 12.[27] If the United States and the Tribe prevail in these proceedings, a significant amount of the additional water that may be needed to satisfy the fishery requirement will come from sources other than the rights decreed for the benefit of the Newlands Project.

Further, there continues to be considerable doubt concerning the amount of water to which TCID is entitled. TCID's *Orr Ditch* right is different from that of all other adjudicated rights.

The decree provides that the water duties for Newlands Project lands *"shall not exceed,* after transportation loss and when applied to the land," 3.5 acre feet per acre for the bottom lands and 4.5 acre feet per acre for the bench lands. PA 59a, emphasis added. Specific water duties, not simply ceilings, are awarded to all other parties. Approximately two-thirds of the project acreage is subject to a contractual limitation of not more than 3 acre feet per acre. And the temporary decree governing the use of Carson River water on the Newlands Project prior to 1980 provided a water duty not to exceed 2.92 acre feet per acre "from all sources." *See United States v. Alpine Land & Reservoir Co.,* 503 F. Supp. 877, 886 (D. Nev. 1980), *affirmed,* — F. 2d — (9th Cir., January 24, 1983);

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[27] The *Orr Ditch* decree has been enforced only twice since 1944. PA 210a.

Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 257 (D. D. C. 1973). Unlike the other adjudicated rights, the *Orr Ditch* decree does not set forth the amount of the Truckee River diversion to which TCID is entitled, nor does it define the amount of transportation or conveyance losses for TCID's diversion. There is no determination of the number of bottom and bench lands. And the water right awarded to the United States for the Project is expressly made subject to "such control, disposal and regulation as the plaintiff [United States] may make or desire. . . ."[28]

Due to these ambiguities, conflicts and uncertainties, the water entitlement of the Newlands Project has been debated and litigated for the past fifteen years. Prior to 1967, no effort was made by the United States to limit TCID's diversions within its decreed rights. 43 CFR § 418.1(b). In that year, the Secretary promulgated regulations which established a total, maximum diversion demand for the Project from both the Truckee and Carson Rivers of 406,000 acre feet per year, but provided for possible reductions in future years. 43 CFR § 418.4(c). This ceiling was reduced to 378,000 acre feet by the Secretary in 1972, *see Pyramid Lake Paiute Tribe of Indians*

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[28]In this case, TCID and Nevada insist on the sanctity of the 1944 *Orr Ditch* decree. In *Alpine, supra,* by contrast, they are striving, thus far successfully, to overcome the force of pre-1926 recorded contracts covering more than 42,000 acres of the Newlands Project that limit the water duty of those lands to no more than 3 acre feet per acre. The contracts are consistent with the *Orr Ditch* decree because 3 acre feet per acre does not "exceed" the *Orr Ditch* ceilings of 3.5 and 4.5 acre feet per acre and the contracts are expressly authorized by the provision of the decree empowering the United States to regulate and control the Project's water rights.

v. Morton, supra, 354 F. Supp. at 255, and then to 350,000 acre feet in 1973 and to 288,129 acre feet in 1974 and succeeding years as a result of the Court's Order in *Pyramid Lake Tribe v. Morton, supra,* and subsequent regulations. *See* 354 F. Supp. at 260-62; 38 F. R. 6697 (1973); 40 F. R. 1109 (1975); 41 F. R. 5411 (1976); 43 F. R. 61267 (1979).

These reductions have not taken effect because TCID has controlled the diversion facilities and has refused to comply with the Secretary's regulations. *See supra,* at 17-18 n. 11. But they illustrate that the Newlands Project's water right was not definitely established by the *Orr Ditch* decree and that it has been subject to continuing controversy.[29]

Under these circumstances, it is impossible to predict the ultimate impact of the Tribe's fishery water right on TCID's water rights. There are simply too many unknowns and variables in this case (*e. g.,* the existence and extent of the Tribe's right), in other pending cases (*e. g.,* the rights and powers of the Secretary to control and regulate the Project's entitlement), and in possible future cases (*e. g.,* TCID's right to damages against the United States for breach of contract). Nevada's statement that affirmance of the decision below will result in in-

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[29]Questions concerning the validity of the Secretary's post-1973 regulations and of his termination of the 1926 contract pursuant to which the Newlands Project is operated by TCID are presented in Truckee-Carson Irrigation District v. Secretary of the Interior, Civ. No. R-74-34 BRT (D. Nev.). That case has been tried, briefed and argued, and is awaiting decision. *See* Brief for the United States in Opposition to Certiorari at 4 n. 6, 6-7 n. 8; Brief for the Pyramid Lake Tribe in Opposition to Certiorari at 3-6.

calculable hardship to TCID is totally unsubstantiated and unfounded.[30]

On the other hand, if the petitioners prevail, the United States and the Tribe will be deprived of the opportunity of establishing that the Pyramid Lake fishery needs more water than it is currently receiving. They will not be able to show, for example, that the continued decline of the level of Pyramid Lake, accompanied by increasing salinity of the Lake's waters, will render the Lake unfit for the Lahontan cutthroat trout, a threatened species, or the cui-ui, an endangered species that is unique to Pyramid Lake. If it turns out that the trout and cui-ui need more water to survive, upholding the petitioner's position would result in the destruction of the Tribe's most valuable asset, the very purpose for which its Reservation

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[30]Nevada's unsupported claim (Br. at 48) that "an entire region . . . has built its livelihood, its very existence, upon the *Orr Ditch* Final Decree" is sheer nonsense. As Nevada itself notes (Br. at 3), virtually all of the farm land in the Truckee River basin had been settled by 1880 and the Newlands Project initiated its diversions from the Truckee River in 1905. All of the Project's major facilities were constructed long before 1944 and TCID assumed the obligation to reimburse the United States for a portion of those construction costs in 1926. Ex. B-492. By definition, all of the rights adjudicated in the *Orr Ditch* Final Decree, except the reserved rights of the Pyramid Lake Indian Reservation, are predicated on appropriations and uses of water that pre-date the decree. And the decree has been enforced only twice since 1944. PA 210a.

The record in this case is devoid of any evidence concerning what, if anything, the defendants would have done differently after 1944 if a fishery water right had been included in the *Orr Ditch* Final Decree. *Compare* City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 123 Cal. Rptr. 1, 537 P. 2d 1250, 1281-84 (1975) (Los Angeles relied on California Supreme Court's decisions adjudicating it a Pueblo water right and would have acted differently in the absence of such decisions).

was established,[31] and the loss of "the only pure species remaining in the genus Chasmistes." *Carson-Truckee Water Conservancy District v. Watt*, 549 F. Supp. 704, 710 (D. Nev. 1982). Nevada's misuse of "incalculable" is ironic, for that precise word was chosen by the Congress to describe the consequences to the nation and the world of any such loss. *See TVA v. Hill*, 437 U. S. 153, 172-79, 186, 187-88 (1978). *See also, Cappaert v. United States*, 426 U. S. 128 (1976) (United States held entitled to a reserved water right to insure the survival of an endangered species).

CONCLUSION

The judgment of the Court of Appeals should be affirmed insofar as it rejects TCID's res judicata defense.

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[31]Congress has declared that "restoration of the Pyramid Lake trout fishery to its full potential value is deemed to be of national interest and importance." PA 208a, 256-57a. President Reagan's January 1983 Statement on Indian Policy stressed that development of reservation economies and natural resources, including fishing, is the highest priority of Indian leaders and the Administration. 19 Weekly Comp. of Pres. Doc. 98, 100 (January 24, 1983). A fully restored Pyramid Lake fishery would have enormous worth, PA 238a, and would fulfill the national policy declared by the Congress of "develop[ing] and utiliz[ing] Indian resources, both physical and human, to a point where Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive effort comparable to that enjoyed by non-Indians in neighboring communities." 25 U. S. C. § 1451. *See* White Mountain Apache Tribe v. Bracker, 448 U. S. 136, 143-44 & n. 10 (1980).

Respectfully submitted,

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SCOTT B. MCELROY
Native American Rights Fund

Attorneys for Respondent Pyramid Lake Paiute Tribe of Indians

February, 1983

APPENDIX

Exhibit Nos.	Transcript References	
	Offered	Admitted
B-326	464	464
B-364	481	481
B-365		483
B-492	376	379
U-242	1047	1059
U-265	1047	1059
V-17	1062	1063

App. 2

Ex. U-242

January 7, 1932

Mr. E. W. Kronquist, Engineer
Indian Irrigation Service
Schurz, Nevada

Dear Mr. Kronquist:

Further reference is made to your letter of December 5th, 1931 in regard to a complaint of the Indians at Pyramid Lake that their fishing is being ruined by irrigation above the reservation.

You have, no doubt, already received the Truckee River run-off records at Derby Dam requested in your letter, which were forwarded to you on December 15th, last.

In connection with this matter, the following points are presented for appropriate consideration:

1. The United States, through its Reclamation Bureau, expended in excess of seven million dollars in constructing the system of works for irrigation of Newlands Project lands. Included in this system of works is the Truckee Canal and its diversion works at Derby for the purpose of conveying up to 1500 c.f.s. of water from the Truckee River to Carson River or Lahontan Reservoir. Construction cost of this canal was about $1,500,000. Water rights were sold to hundreds of settlers. The water diverted from the Truckee Canal supplies in excess of 60% of the water supply of the Newlands Project, the major part of which is winter diversion. The necessity for di-

verting this water from the Truckee River to Lahontan Reservoir for irrigation of Newlands Project lands is obvious and one that cannot be relinquished by the United States because of its sale of water rights to hundreds of settlers and acceptance of payment therefor. Furthermore, the United States has been decreed the right to so divert the water to the Newlands Project, which decree also provides for sufficient water for the irrigation of the Pyramid Indian lands.

2. As you are aware, numerous allotments of land in the Fallon Indian Reservation on the Newlands Project near Stillwater have been made to Indians who are now farming such allotments and for which the United States has purchased and paid for water rights depending largely on the Truckee River for their supply. The total area covered by water right in the Fallon Reservation amounts to 4,877.3 acres and the area under actual irrigation and cultivation probably exceeds the area irrigated by the Indians at Pyramid Lake.

3. The present low elevation at Pyramid Lake has been caused, largely, by diversion of winter flow of Truckee River water into Lahontan Reservoir, but nevertheless there are other substantial contributing causes to the low elevation of Pyramid Lake, among which may be included:

(a) Unusually subnormal runoff of the Truckee River watershed due to dry cycle during the last ten year period.

(b) Adverse diversions as against the lawful rights of the United States (including Newlands Project and the Pyramid Lake Indian lands) upstream on the Truckee River. Such unlawful diversions include many hundreds

of diversions in small quantities. Large diversions in California may be specifically pointed out by reference to Sierra Valley, where as high as 50 c. f. s. are diverted by Sierra Valley farmers from the Little Truckee into Sierra Valley which is located in the Feather River watershed. Also construction of a new and higher dam at Donner Lake, whereby the Donner Lake Company withholds from Truckee River flow several thousand acre feet each year. Also adverse diversions at Echo Lake by the Pacific Gas & Electric Company, where water is diverted from Lake Tahoe watershed into and upon the western slopes of the Sierras and used for power generation in California. All of these diversions contribute substantially to the shortage of water in Pyramid Lake.

(c) Lahontan Dam is situate in the channel of the Carson River. The more water that can be obtained from the Carson River for Newlands Project use will, of course, release a corresponding amount for Pyramid Lake. Since the inception of the Newlands Project, unlawful adverse diversions upstream on the Carson River, both in California and Nevada, have robbed the United States of thousands and thousands of acre feet of water which might have been used on the Newlands Project in lieu of Truckee River waters.

If those interested in the welfare of the Indians would protect the lawful rights of the United States to water in the Truckee and Carson Rivers and in Lake Tahoe, there would be but little need for complaint of a receding of Pyramid Lake in normal years of precipitation, which will doubtless soon obtain. Instead of sitting idly by and permitting the settlers upon the Newlands Project to car-

ry the entire burden in the Carson River suit, doubtless better results would be obtained. Also if the Indian Department would insist upon the Department of Justice immediately instituting proceedings to enjoin adverse diversions in Sierra Valley, Donner Lake, Echo Lake, Lake Tahoe and other points, instead of petitioning senators and congressmen to furnish them water at the expense of the Newlands Project, doubtless immediate and beneficial results would be obtained and fish life, with its resulting livelihood to the Indians, would be amply protected.

For your further information you will please find enclosed herewith copy of a letter dated December 5th, 1931 from Truckee River Water Master — C. Dukes addressed to Honorable Thomas B. Snoddy, Superintendent Pyramid Lake Indian Agency, Nixon, Nevada, on the same subject, Doctor Snoddy, together with yourself, I understand, having been instructed by officials of the Indian Office to furnish information relative to the complaints filed by the Pyramid Indians. As you know, Mr. Dukes has served as the agent of the United States District Court since about March, 1926, for the administration of the provisions of the so-called Talbot Decree or temporary restraining order in the Truckee River case described in Mr. Dukes' letter.

It is believed unnecessary in this letter to go into the details with respect to the provisions of the June 1915 Lake Tahoe Decree and the Talbot Decree, with which you are familiar, and in accordance with which Federal Court orders the Newlands Project has regulated the outflow of Lake Tahoe and received its water from the Truckee River.

Trusting that the above will supply the information which you requested, I am

Very truly yours

D. S. Stuver
Project Manager

Encls.

DSS:W

cc—Commissioner, Bureau of Reclamation, Washington, D. C.

—Commissioner, Office of Indian Affairs, Washington, D. C.

—Hon. Lynn J. Frazier, Chairman Senate Indian Committee, Washington, D. C.

—Mr. Roy W. Stoddard, Reno, Nevada

EX. U-265

May 26, 1934.

Judge Gustave A. Iverson,
Special Assistant to the U. S. Attorney General,
Department of Justice Building,
Washington, D. C.

My dear Judge Iverson:

RE: Proposed Truckee River Agreement and Stipulation.

On May 21, 1934, I submitted a memorandum for Assistant Attorney General Blair in connection with the above matter, in which memo some of the pertinent facts and circumstances were related, and particular reference was made to the report or opinion of Mr. Ethelbert Ward, Special Assistant to the United States Attorney General, regarding the same.

On the last paragraph of page 4 of said memorandum the following statement was made:

> "The Truckee-Carson Irrigation District and the Newlands Project are not involved for the reason that their priority is as of 1902 in any event, and the Truckee-Meadows lands being senior to the Newlands Project rights to the extent of about 28,000 acres, the adverse effect of a claim for an additional 19,000 acres of Indian land with the priority of 1859, would be to the detriment and damage of the old settlers in the Truckee Meadows rather than as and against the Truckee and Carson divisions of the Newlands Reclamation Project."

After reconsidering the statement above quoted, I now desire to and do withdraw the same for the reason that after telegraphing Mr. Stuver, the Project Manager

and Engineer of the Newlands Reclamation Project and of the Truckee-Carson Irrigation District at Fallon, I am advised that the proposed increased diversion rights recommended by Mr. Ward in the Truckee River final decree in addition to the rights determined and found by the Federal Court in the temporary restraining order entered in the Truckee River suit, for 19,000 acres of Pyramid Lake Indian reservation bench lands, will not only be detrimental and prejudicial to the Newlands Reclamation Project lands but in fact so injurious as to cut off any available water from the Truckee River for the irrigation of the project lands after the run-off season, if such additional rights are awarded by the Federal Court to the Indian lands as suggested and recommended by Mr. Ward.

In lieu of the said last paragraph on page 4 of my said memo, I desire to insert the following:

> "The allowance by the Federal Court of the additional right of the United States to divert water of the Truckee River for the irrigation of approximately 19,000 acres of the bench lands situate within the boundaries of the Pyramid Lake Paiute Indian reservation would not only jeopardize and impair but would for all practical purposes destroy the water rights heretofore sold by the United States through the Secretary of the Interior (Bureau of Reclamation) for the irrigation of the bench lands of said project (the Truckee Canal lands), and in addition would impair the now available water supply for the Lahontan lands (Carson Division) of said project."

In addition to the alteration of the statement above referred to in my memo of May 21, 1934, I desire to add and supplement the same by way of further reply to Mr. Ward's opinion and recommendation.

Directing attention to the issues joined in the suit, it should be noted that the United States in its bill of com-

plaint in the Truckee River suit used the general broad statements as to Indian rights that are usually alleged in suits of that character and claimed a right for the irrigation of some 40,000 acres of land with a priority as of 1859.

After the taking of testimony over a period of thirteen years and extensive briefs and arguments, the matter was submitted to the Federal District Judge who in his temporary restraining order (Claim 2) says:

> "In addition to water for the above mentioned 3130 acres of Pyramid Lake Indian reservation bottom lands, the Government *asks* for water with a priority of December 8, 1859, the date of the withdrawal by the Commissioner of the General Land Office of the lands for the reservation, for the irrigation of five acres of reservation bench lands for each Indian belonging to the reservation at the time when the allotment will be made to them of this amount of land under the Act of Congress of April 21, 1904."

It will be presumed from the Court's statement and until the contrary is shown, that notwithstanding the allegations in the Government's bill of complaint, all the United States asked in addition to the 3130 acres of bottom lands actually in irrigation, was such additional portion of the bench lands as would represent five acres to each Indian entitled to such allotment.

It seems clear that the United States cannot now, after a lapse of twenty-one years, come into court on a motion for amendment of the temporary restraining order, and claim a right for an additional 19,000 acres with a priority of 1859, which, when irrigated with waters of the Truckee River with such priority, would completely deprive the bench lands of the Newlands Project of water

for irrigation from that source which is their sole means of supply. This, it seems to me, is particularly true when the United States has, in the meantime, disposed of the rights to such water to settlers under the Truckee Canal who are now striving to maintain their homes and farms under the Truckee Canal and whose welfare depends entirely upon available water for irrigation from the Truckee River predicated upon the rights of the United States.

I also desire to call your attention to the provisions of the Act of Congress of April 21, 1904 (33 Stat. 189, 225), in Section 26 thereof, which is quoted verbatim by Mr. Ward.

The intent of Congress is clearly manifested in that section to the effect that the lands for which Mr. Ward now recommends additional water be made available with a priority of 1859, were by Congress set aside and apart from the Indian reservation and made available for settlement under the provisions of the reclamation law. It is stated by Mr. Ward that "It was by virtue of this act that the 19,000 acres of the bench lands of the reservation were included as a part of the Newlands Reclamation project."

Hence I find it difficult to understand how the Bureau of Indian Affairs became interested as to what water rights are appurtenant to Newlands Reclamation Project lands excepting such as may be allotted on the basis of five acres for each Indian.

For the United States to come now into court at this late date and claim that because of the pending Wheeler-Howard bill or other possible future similar legislation by Congress, an additional right for the irrigation of 19,000 acres of Indian Bench lands with a priority as of 1859, should be decreed, is so unfair and without equity to the

settlers who have purchased water rights from the United States through the Bureau of Reclamation, and who would be deprived of the water purchased thereby, that favorable action by the court upon such a request would be extremely doubtful to say the least.

I quote the following telegram received from Mr. D. S. Stuver, who, as above stated, is the engineer and manager of the Truckee Carson Irrigation District, which under contract has possession of and is operating the Newlands Project system of works as follows:

> "Retel date please advise on what basis Indian Department wants diversion right for nineteen thousand acres and from what source water therefore might be available stop our opinion such allocation would render any other use of Truckee River waters impossible."

In connection with Mr. Stuver's telegram we suggest that you investigate through engineers of the Bureau of Reclamation and of the Bureau of Indian Affairs the question of how much water will be available in years of subnormal precipitation in the Truckee River for diversion into the Truckee Canal (Newlands Project) and/or for diversion by the settlers in the Truckee Meadows, after 19,000 acres of Indian land requirements are met with a priority as of 1859. The answer is obvious to any one familiar with the stream flow records. There will be no water available for any purpose other than the irrigation of Indian lands.

I am not unmindful of the fact that the Indian lands are not entitled to any artificially stored water in Lake Tahoe, but in this connection I want to say that under the terms and provisions of the 1915 decree, actual experience has shown that in the dry years or years of insufficient

supply there is no water available under the terms of this decree in any substantial quantity for the Newlands Project during the irrigation season of such dry years.

I have been handed a copy of the suggestions and recommendations of Mr. John F. Truesdell, acting District Counsel, Indian Affairs, under date of May 9, 1934.

Mr. Truesdell's first objection seems in substance to be that there should be no stipulation for "modification of the temporary restraining order, as far as the defendants' rights are concerned, until that order is made permanent, etc." and "it seems to me that the first thing is to make the order permanent".

It will be noted from the provisions of the proposed Truckee River agreement and stipulation that the stipulation for entry of final decree cannot become effective for any purpose until the completion of the upstream reservoir at the expense of the Washoe County District and completion of the construction of pondage reservoirs by the Sierra Pacific Power Company. This for the reason that the Truckee-Carson Irrigation District (Newlands Reclamation Project) is not willing to merge its rights to artificially stored water with the upstream farmers, nor are the upstream farmers willing to merge their senior diversion rights to natural flow until the completion of the construction of the reservoir makes additional water available for the benefit of both parties.

Obviously, neither of these parties are willing to enter into an immediately effective stipulation for entry of final decree until the condition precedent has been accomplished.

As to Mr. Truesdell's second point, which refers to his objection of the provision incorporated in the tempo-

rary restraining order by the District Court to the effect that the rights allowed the United States for the irrigation of 3130 acres of reservation bottom lands cannot be transferred to homesteaders or others, I do not believe that any objections will be interposed to striking such provision when the final decree is entered.

I trust that you will cause the above to be transmitted to the Secretary of the Interior or the proper departmental head to supplement and amend the statement which I handed to you on the 21st. instant.

I am leaving for Reno in the morning, but if a conference is desired on the details of the Truckee River agreement and its relation to the above matters, Mr. Thomas R. King, Engineer and Manager for the Washoe County District, is remaining in Washington for such purpose and can be located at the Raleigh Hotel or in care of the Bureau of Reclamation, New Post Office Building.

Respectfully,

/s/ Roy W. Stoddard.